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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

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| RONALD HOGAN et al.,<br>Plaintiffs and Appellants,<br>v.<br>DEANGELIS CONSTRUCTION, INC., et al.,<br>Defendants and Respondents. | A152771<br><br>(Sonoma County<br>Super. Ct. No. SCV 257566) |

In 2002, Ronald and Victoria Hogan (together the Hogans) sued DeAngelis Construction, Inc., DeAngelis-Pope Homes, Marvin DeAngelis, and Gary Pope (collectively the Developers) and Clayton Engstrom, Jr., and Mary Engstrom (together the Engstroms), asserting claims related to the Hogans' purchase of a home in 2000. We refer to this lawsuit, *Hogan, et al. v. DeAngelis Construction, Inc*. (Sonoma County Super. Court No. SCV–230846), as the prior lawsuit or *DeAngelis I*. In the prior lawsuit, the Hogans alleged the home was defective in various ways and defendants failed to disclose material facts about the home. *DeAngelis I* resulted in a trial court order rescinding the purchase agreement for the home, a jury trial on consequential damages, a judgment (sometimes referred to as the "modified amended judgment"), many appeals, and six appellate decisions by this court.[1] Most recently, in 2018, we ordered the trial

[1] (See *Hogan v. DeAngelis Construction, Inc.* (A117321, A118257, A120840, May 20, 2009) [nonpub. opn.], pp. 5, 8–10 (*Hogan I*) [describing the trial court order of rescission and jury trial on damages]; *Hogan v. DeAngelis Construction, Inc*. (A146057,

court to deem the judgment satisfied as to the Developers (*Hogan V*, *supra*, at p. 22), and we affirmed an order compelling the Hogans to acknowledge satisfaction of judgment as to the Engstroms (*Hogans VI*, *supra*, at pp. 1, 13).

In 2015, the Hogans initiated the current lawsuit against the Developers and the Engstroms (*DeAngelis II*). Again, the Hogans asserted claims related to their home purchase in 2000 and their discovery of significant defects in the home in 2001 and 2002, and they added new allegations describing the prior lawsuit and other litigation. The Engstroms and the Developers separately filed demurrers, and the trial court sustained the demurrers without leave to amend, relying on the doctrines of res judicata and collateral estoppel. The Hogans appeal.

We affirm.

## FACTUAL AND PROCEDURAL BACKGROUND[2]

In May 2000, Ronald Hogan purchased a home on Gardenview Place in Santa Rosa (Gardenview property) for $499,000. The sellers were DeAngelis/Pope Homes, Marvin DeAngelis, and Gary Pope. The Engstroms were realtors and dual agents; they represented the sellers and the buyer in the purchase of the Gardenview property.

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A146582, A147273, May 17, 2018) [nonpub. opn.], p. 4 (*Hogan V*) [referring to the operative judgment filed on April 20, 2010, "as the modified amended judgment or the judgment"]; *Hogan v. DeAngelis Construction, Inc*. (A149571, May 17, 2018) [nonpub. opn.], p. 1 (*Hogan VI*) ["This is our sixth opinion in this action"].) The trial court took judicial notice of *Hogan I*, and we have taken judicial notice of *Hogan V* and *Hogan VI* by order filed October 9, 2018, granting the Engstroms' request for judicial notice. Further, we may cite our prior opinions "to explain the factual background of the [current] case" (*K.G. v. Meredith* (2012) 204 Cal.App.4th 164, 172), and we may rely on them here because they are relevant under the doctrines of res judicata and collateral estoppel (Cal Rules of Court, rule 8.1115(b)(1)).

[2] Many of the background facts are based on the Hogans' first amended complaint in the current case, court records in *DeAngelis I*, and facts recited in our prior opinions arising from appeals in *DeAngelis I*. (See *Crowley v. Katleman* (1994) 8 Cal.4th 666, 672, fn. 2 (*Crowley*); Cal Rules of Court, rule 8.1115(b)(1); *K.G. v. Meredith*, *supra*, 204 Cal.App.4th at p. 172.)

*Prior Lawsuit*

On August 23, 2002, the Hogans initiated *DeAngelis I* by filing a complaint in Sonoma County Superior Court against the Developers and the Engstroms. Among other things, the Hogans alleged, "the Defendants had a fiduciary duty to disclose all known facts regarding the condition of the [Gardenview] property, all hazardous natural conditions and other material facts which would affect the Plaintiffs' decision to purchase the subject property. Defendants failed to meet their fiduciary duty to disclose these facts. [¶] . . . Plaintiffs are informed and believe that certain portions of their home have been constructed in a manner that is not in conformance with the approved plans and specification, the standards in the industry or requirements of the City of Santa Rosa building and planning departments" and "Defendants did not reveal, disclose or inform Plaintiffs of the defective conditions . . . ."[3]

In *DeAngelis I*, the Hogans asserted claims of breach of contract, intentional misrepresentation by concealment, intentional infliction of emotional distress, negligent misrepresentation, breach of implied warranty, strict liability, fraud in the inducement and rescission, negligence, breach of fiduciary duty, and tort of another. They "sought both legal damages and relief based on rescission." (*Hogan I*, *supra*, at p. 1.)

"During the course of litigation [in *DeAngelis I*], the Developers formally accepted the rescission and offered to restore the Hogans' consideration. In May 2004, the superior court filed an order confirming that the Gardenview purchase agreement was rescinded. Nevertheless, the Hogans retained possession of the Gardenview property and the litigation continued, culminating in a jury trial and [an] amended judgment." (*Hogan I*, *supra*, at pp. 1-2.)

The Hogans appealed, primarily arguing that the trial court's 2004 rescission order was erroneous. (*Hogan I*, *supra*, at p. 19.) They maintained they should have been

[3] These allegations are taken from the Hogans' third amended complaint in *DeAngelis I*, which the trial court took judicial notice of. The Hogans agree the third amended complaint was the operative complaint in *DeAngelis I*.

allowed to elect their remedy, and "their chosen remedy was legal damages, not rescission." (*Id*. at p. 26.) In May 2009 in *Hogan I*, we rejected this argument, concluding "a straightforward application of the rescission statutes compels the conclusion that the Gardenview property purchase agreement was unilaterally rescinded by the Hogans." (*Id*. at p. 22.) We remanded the case to the trial court with instructions to modify the amended judgment. (*Id*. at p. 57.)

"On April 20, 2010, the trial court filed an order modifying the June 2007 amended judgment in accordance with [*Hogan I*]. Among other things, the judgment was modified to provide: 'The Hogans are entitled to $278,446.97 from any or all of the Developer Defendants[4] . . . at the time that Plaintiffs return the [Gardenview property] to Developer Defendants. The Engstrom defendants are jointly and severally liable for a portion of the Hogans' consequential damages awarded against the Developers, and . . . the Engstroms' share of that joint and several liability is equivalent to the damages awarded against them, in the collective amount of $65,000 (sixty-five thousand), for intentional concealment and breach of contract in the Judgment and Amended Judgment.' " (*Hogan, et al. v. DeAngelis Construction, Inc., et al.* (A128451, A130351, Apr. 18, 2012) [nonpub. opn.], p. 12 (*Hogan II*).)

Despite our 2009 affirmance of the rescission of the Gardenview property purchase agreement in *Hogan I* and the subsequent modified amended judgment filed in the trial court in April 2010, the judgment in *DeAngelis I* was not executed, and "the Hogans continue[d] to retain possession [of] the Gardenview property." (*Hogan II*, *supra*, at p. 2.)

In April 2012, we decided a second round of appeals arising from *DeAngelis I*. In *Hogan II*, we rejected the Hogans' argument that they were "entitled to full payment of

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[4] We note that in our prior opinions in appeals from *DeAngelis I*, we have referred to Marvin DeAngelis, Gary Pope, DeAngelis Construction, Inc., and sometimes DeAngelis-Pope Homes collectively as "the Developers," "the developers," or "the developer defendants." (See *Hogan I*, *supra*, at p. 1; *Hogan II*, *supra*, at p. 1; *Hogan V*, *supra*, at p. 1.)

all of their money damages and litigation costs *before* they ha[d] to vacate the Gardenview property," and we "unequivocally affirm[ed] prior orders in [*DeAngelis I*] which establish[ed] that the payment of any consequential damages to the Hogans [wa]s *conditioned* on the return of the Gardenview property to the Developers." (*Hogan II*, *supra*, at p. 2, italics added.)

In response to *Hogan II*, the Hogans stopped paying their mortgage but continued to refuse to execute the judgment. (*Hogan V*, *supra*, at pp. 2, 7.) The Gardenview property was sold in nonjudicial foreclosure proceedings. The Developers then "moved (with the Engstroms) to deem the judgment fully satisfied, arguing their obligations under the judgment could never mature because the Hogans could never satisfy the return condition." (*Id*. at p. 2.)

In May 2018, we ordered the trial court to enter an "order deeming the judgment fully satisfied as to the [D]evelopers" (*Hogan V*, *supra*, at p. 22), and we affirmed the trial court's order that the Hogans execute an acknowledgment of satisfaction of judgment as to the Engstroms (*Hogan VI*, *supra*, at pp. 4–5, 13.)[5] In *Hogan VI*, we concluded in no uncertain terms, "As the Engstroms were entitled to a full satisfaction of judgment, this finally concludes the Hogans' litigation against the Engstroms with regard to the Gardenview property." (*Id*. at p. 13.)

[5] "In October 2009 the Engstroms attempted to pay the Hogans $81,972 ($65,000 plus accrued interest) in full satisfaction of the judgment, but the Hogans refused. The Engstroms then deposited the funds into a court account, in trust for the Hogans (the court deposit)." (*Hogan VI*, *supra*, at p. 2, fn. omitted.) "In 2015, despite not having returned the property to the developers (as required by the judgment), the Hogans moved for and obtained an order to release the Engstroms' court deposit. The funds were released to the Hogans." (*Id*. at p. 3, fn. omitted.) "Once the Hogans received the court deposit, the Engstroms demanded that the Hogans provide an acknowledgement of satisfaction of judgment. The Hogans objected . . . ." (*Ibid*.) The Engstroms moved to compel the Hogans to provide an acknowledgment of satisfaction of judgment, the trial court granted the motion, and we affirmed. (*Id*. at pp. 4–5, 13.)

*Current Lawsuit*

On August 12, 2015, the Hogans initiated *DeAngelis II*, the lawsuit underlying this appeal, by filing a complaint in Sonoma County Superior Court. On March 9, 2017, they filed a first amended complaint, the operative complaint, against the Developers and the Engstroms.[6]

In *DeAngelis II*, the Hogans alleged that Ronald Hogan purchased the Gardenview property in 2000 and that, in 2001 and 2002, they "discovered significant construction defects, undisclosed conditions, and legal issues affected the property when it was illegally sold to Ronald Hogan in violation of the Subdivided Lands Act with a contract that had not been approved by the California Department of Real Estate and with a number of concealed conditions including fire hazards, flight path noise, a commercial business within the subdivision, a dramatic change in the density of housing from single family to a massive apartment complex adjacent to the . . . Subdivision and the Hogan lot, geologic hazards with related uncalculable [*sic*] and undisclosed maintenance consequences and related ongoing litigation."

The Hogans asserted 17 causes of action: (1) unsecured debt, (2) equitable subrogation, (3) false pretense, (4) breach of quasi-contract, (5) fraud and deceit, (6) constructive trust, (7) declaratory relief, (8) wrongful foreclosure and fraudulent conveyance, (9) unjust enrichment, (10) promissory estoppel, (11) unfair business practices, (12) conversion, (13) "for money had and received," (14) tort of another, (15) indemnity, (16) negligent infliction of emotional distress, and (17 intentional infliction of emotional distress.

[6] *DeAngelis II* is actually the Hogans' *third* lawsuit against the Developers related to the purchase of the Gardenview property. In *Hogan, et al. v. Cenlar FSB, et al.* (Sonoma County Super. Court No. SCV–254820) (*Cenlar*), the trial court sustained the Developers' demurrer without leave to amend based in part on res judicata/collateral estoppel. The trial court expressly found the Hogans were "seeking to enforce the same rights [in *Cenlar*] as they did in [*DeAngelis I*]."

*Defendants' Demurrers*

On April 13, 2017, the Engstroms filed a demurrer to the first amended complaint, arguing the Hogans' claims against them were barred by the doctrine of res judicata and the statutes of limitations. In support of their demurrer, the Engstroms requested the court take judicial notice of various documents from *DeAngelis I*, including the third amended complaint, the modified amended judgment filed on April 20, 2010, and our opinions *Hogan I*, *Hogan II*, and *Hogan, et al. v. DeAngelis Construction, Inc., et al.* (A143637, Jan. 13, 2016) [nonpub. opn.] (*Hogan IV*).

On June 14, 2017, the trial court granted the Engstroms' request for judicial notice and sustained the demurrer without leave to amend. The court explained, "All of the claims involve alleged conduct in Plaintiffs' purchase of the [Gardenview] Property and all were litigated in the Original Action [*DeAngelis I*]. Moreover, most of Plaintiffs' Cause of Actions do not on their face even actually state a possible claim against the Engstroms. [The] Engstroms paid Plaintiffs what they owed Plaintiffs in the Original Action and have had no involvement in the rescission, subsequent events causing the foreclosure, the foreclosure, . . . or disputes over the foreclosure and failure of DeAngelis to pay Plaintiffs." The court held, "The Hogans are collaterally estopped from pursuing this action against the Engstroms."

On August 8, 2017, the trial court filed a judgment dismissing the first amended complaint as against the Engstroms and awarding the Engstroms costs.

On June 22, 2017, the Developers filed a demurrer. They also argued the Hogans' claims were barred by res judicata and statutes of limitations. They requested the court take judicial notice of a document filed by the Hogans on August 13, 2012, in *DeAngelis I*, the recorded trustee's deed showing the Gardenview property was sold in foreclosure, and documents from *Cenlar, supra,* among other things. Opposing the demurrer, the Hogans also asked the court to take judicial notice of various documents.

On August 16, 2017, the trial court granted the parties' requests for judicial notice and sustained the Developers' demurrer without leave to amend. The court reasoned, "In the instant case, Plaintiffs seek to relitigate issues against the same Defendants rather than

moving to enforce their judgment. This complaint is the wrong vehicle to enforce their judgment. Under the doctrines of res judicata and collateral estoppel, Defendants[’] demurrer is granted as to all causes of action, without leave to amend."

**DISCUSSION**

A. *Standard of Review*

"We independently review the ruling on a demurrer and determine de novo whether the complaint alleges facts sufficient to state a cause of action. [Citation.] We assume the truth of the properly pleaded factual allegations, facts that reasonably can be inferred from those expressly pleaded, and matters of which judicial notice has been taken." (*Fremont Indemnity Co. v. Fremont General Corp*. (2007) 148 Cal.App.4th 97, 111.) "We do not, however, assume the truth of contentions, deductions, or conclusions of fact or law." (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.)

"[A] demurrer may be sustained where judicially noticeable facts render the pleading defective [citation], and allegations in the pleading may be disregarded if they are contrary to facts judicially noticed." (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751 (*Scott*).) Under the truthful pleading doctrine, courts "will not close their eyes to situations where a complaint contains allegations of fact inconsistent with attached documents, or allegations contrary to facts which are judicially noticed. [Citations.] Thus, a pleading valid on its face may nevertheless be subject to demurrer when matters judicially noticed by the court render the complaint meritless." (*Del E. Webb Corp. v. Structural Materials Co*. (1981) 123 Cal.App.3d 593, 604.)

"In order to prevail on appeal from an order sustaining a demurrer, the appellant must affirmatively demonstrate error. Specifically, the appellant must show that the facts pleaded are sufficient to establish every element of a cause of action and overcome all legal grounds on which the trial court sustained the demurrer. [Citation.] We will affirm the ruling if there is any ground on which the demurrer could have been properly sustained." (*Scott, supra,* 214 Cal.App.4th at p. 752.)

"If the court sustained the demurrer without leave to amend, as here, we must decide whether there is a reasonable possibility the [appellant] could cure the defect with an amendment. [Citation.] If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred. [Citation.] The [appellant] has the burden of proving that an amendment would cure the defect." (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

B. *Analysis*

" 'Res judicata' describes the preclusive effect of a final judgment on the merits. Res judicata, or claim preclusion, prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them. Collateral estoppel, or issue preclusion, 'precludes relitigation of issues argued and decided in prior proceedings.' [Citation.] Under the doctrine of res judicata, if a plaintiff prevails in an action, the cause is merged into the judgment and may not be asserted in a subsequent lawsuit; a judgment for the defendant serves as a bar to further litigation of the same cause of action.

"A clear and predictable res judicata doctrine promotes judicial economy. Under this doctrine, all claims based on the same cause of action must be decided in a single suit; if not brought initially, they may not be raised at a later date. . . . A predictable doctrine of res judicata benefits both the parties and the courts because it 'seeks to curtail multiple litigation causing vexation and expense to the parties and wasted effort and expense in judicial administration.' " (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896–897 (*Mycogen*).)

"California's res judicata doctrine is based upon the primary right theory." (*Mycogen, supra,* 28 Cal.4th at p. 904.) The primary right theory "provides that a 'cause of action' is comprised of a 'primary right' of the plaintiff, a corresponding 'primary duty' of the defendant, and a wrongful act by the defendant constituting a breach of that duty. [Citation.] The most salient characteristic of a primary right is that it is indivisible:

the violation of a single primary right gives rise to but a single cause of action."[7] (*Crowley*, *supra*, 8 Cal.4th at p. 681.)

Thus, the judgment in *DeAngelis I* bars the action brought in *DeAngelis II* if both suits seek to vindicate the same primary rights. (*Mycogen, supra,* 28 Cal.4th at p. 904.) We have reviewed the operative complaint in *DeAngelis II* and the operative complaint in *DeAngelis I,* (and we are well-aware of the judicially-noticed facts of *Hogan I, Hogan II, Hogan IV, Hogan V* and *Hogan VI*), and we conclude both lawsuits seek to vindicate the same primary rights. Both lawsuits involve allegations that the Gardenview property was defective,[8] and both lawsuits involve allegations that defendants committed fraud in the sale of the Gardenview property in 2000.[9]

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[7] " 'In California the phrase "cause of action" is often used indiscriminately . . . to mean *counts* which state [according to different legal theories] the same cause of action. . . .' [Citation.] But for purposes of applying the doctrine of res judicata, the phrase 'cause of action' has a more precise meaning: The cause of action is the right to obtain redress for a harm suffered, regardless of the specific remedy sought or the legal theory (common law or statutory) advanced. [Citation.] . . . '[T]he "cause of action" is based upon the harm suffered, as opposed to the particular theory asserted by the litigant. [Citation.] Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief. "Hence a judgment for the defendant is a bar to a subsequent action by the plaintiff based on the same injury to the same right, even though he presents a different *legal ground* for relief." [Citations.]' Thus, under the primary rights theory, the determinative factor is the harm suffered. When two actions involving the same parties seek compensation for the same harm, they generally involve the same primary right." (*Boeken v. Philip Morris USA, Inc*. (2010) 48 Cal.4th 788, 798.)

[8] In *DeAngelis I*, the Hogans alleged they discovered "defects in the roof, framing and foundation, crawlspace, driveway, grading and drainage, heating and air-conditioning and sound suppression systems" in the Gardenview property and defendants "refus[ed] to maintain or repair the defective conditions." In *DeAngelis II*, the Hogans alleged they discovered "significant construction defects" in the Gardenview property in 2001 and 2002.

[9] In *DeAngelis I*, the Hogans alleged the Engstroms "failed to disclose facts material to the purchase for Plaintiffs" and defendants "intentionally and deliberately misrepresented the actual facts about" issues they knew might affect the Hogans' decision whether to buy the Gardenview property. In *DeAngelis II*, the Hogans alleged they received disclosures about the Gardenview property "that turned out to be untrue"

*DeAngelis II* does not involve any alleged wrongful acts by defendants that are different from the wrongful acts alleged in *DeAngelis I*. The Hogans' new allegations in *DeAngelis II* chronicle the course of litigation in *DeAngelis I* and describe things that have happened since the Hogans' stopped paying their mortgage on the Gardenview property. But we find nothing that could reasonably be construed as a wrongful act by any of the defendants that violates a primary right of the Hogans different from the rights litigated in *DeAngelis I*. In short, we agree with the trial court that *DeAngelis II* is barred by res judicata because the Hogans seek to relitigate claims related to the purchase of the Gardenview property that were litigated in *DeAngelis I*.

On appeal, it is the Hogans' burden to affirmatively demonstrate error (*Scott, supra,* 214 Cal.App.4th at p. 752), and they have failed to do so.

The Hogans argue their claims in *DeAngelis II* "arise out of subsequent events in 2012, 2014, 2016 and 2018." These "events" appear to be our decision in *Hogan II* (filed April 18, 2012), the Hogans' decision to stop paying their mortgage (they assert they stopped paying in August 2012), the foreclosure of the Gardenview property in 2014, another sale of the Gardenview property in 2016, our decision in *Hogan, et al. v. DeAngelis Construction, Inc., et al.* (A138118, Jan. 13, 2016) [nonpub. opn.] (*Hogan III*), and our decision in *Hogan V* (filed May 17, 2018). None of these events suggests that any of the defendants committed new wrongful acts different from those alleged in *DeAngelis I*.

The Hogans argue they have stated a new claim for tort of another. Their own argument, however, defeats their claim. They assert, "But for the fraud and breach of fiduciary duty of the defendants, the Hogans would not have purchased and financed the Gardenview property, never brought an . . . action seeking a remedy, never had to try to prevent a foreclosure by suing the lenders and never had to defend a cross complaint." In other words, the "new" claim for tort of another arises from defendants' wrongful acts

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and they later discovered "undisclosed conditions" and "concealed conditions." And they described their purchase of the Gardenview property as "a fraudulent sale."

that induced the Hogans to purchase the Gardenview property, which wrongful acts were undeniably the subject of *DeAngelis I*.

The Hogans' remaining arguments are equally meritless. They argue they have a claim of "indemnity" against defendants, but what they sought in the operative complaint was "indemnity for any action against them by lenders, attorneys, or any third parties, with litigation *stemming from the underlying case*." (Italics added.) On appeal, the Hogans claim they are entitled to damages incurred as a result of their purchase of the Gardenview property and the subsequent rescission of the purchase agreement. However, they already had a jury trial that determined consequential damages arising from the rescission of the Gardenview property purchase agreement. (See *Hogan I*, *supra*, at pp. 32–35 [discussing consequential damages available following the rescission of a contract and rejecting the Hogans' claim for speculative future damages].) In their "indemnity" claims, the Hogans do not state a violation of a new primary right; they merely seek to recover additional damages for the same violations of primary rights that were litigated in *DeAngelis I*.

The Hogans next maintain they have stated a claim for enforcement of a lien under Civil Code section 3050. But any such lien the Hogans may have had in the Gardenview property was extinguished by the foreclosure sale. (*Hogan et al. v. First Technology Federal Credit Union* (A151266, A152170, Aug. 29, 1019) [nonpub. opn.], p. 16.) Further, a lien "is a charge imposed in some mode other than by a transfer in trust *upon specific property* by which it is made security for the performance of an act" (Civ. Code, § 2872, italics added); a lien is not a claim asserted against individual defendants.

Finally, the Hogans argue they have stated a claim under Penal Code section 496, subdivision (c), for theft by false pretense. This subdivision allows a person who has been injured in violation of subdivision (a) or (b) of Penal Code section 496 to bring an

action for three times the amount of actual damages.[10] Suffice it to say the Hogans have not alleged facts suggesting defendants violated Penal Code section 496.

In sum, the trial court properly sustained the Engstroms' demurrer and the Developers' demurrer. As the Hogans have not shown they could cure the defect by amendment, the trial court did not abuse its discretion in sustaining the demurrers without leave to amend.[11]

We grant the Hogans' requests for judicial notice filed April 26, 2019, and May 14, 2019.

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[10] Subdivision (a) of Penal Code section 496, in turn, provides as follows: "(a) Every person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained, shall be punished by imprisonment in a county jail for not more than one year, or imprisonment pursuant to subdivision (h) of Section 1170. However, if the value of the property does not exceed nine hundred fifty dollars ($950), the offense shall be a misdemeanor, punishable only by imprisonment in a county jail not exceeding one year, if such person has no prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 290. [¶] A principal in the actual theft of the property may be convicted pursuant to this section. However, no person may be convicted both pursuant to this section and of the theft of the same property."

Subdivision (b) of the statute applies to "swap meet vendor[s]." (Pen. Code, § 496, subd. (b).)

[11] The Hogans argue for the first time in their reply brief that collateral estoppel cannot bar their current lawsuit because the "rescission judgment was 'entered by confession, consent, or default' and none of the issues raised in [the] original complaint were actually litigated." "Arguments cannot properly be raised for the first time in an appellant's reply brief, and accordingly we deem them waived in this instance." (*Cold Creek Compost, Inc. v. State Farm Fire & Casualty Co.* (2007) 156 Cal.App.4th 1469, 1486.) In any event, as the Developers point out in opposition to the Hogans' first request for judicial notice, the modified amended judgment in *DeAngelis I* was not a default or stipulated judgment; it was the result of multiple contested hearings, a jury trial, and *Hogan I*.

## DISPOSITION

The judgments are affirmed.

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Miller, J.

We concur:

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Kline, P.J.

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Stewart, J.

A152771, *Hogan, et al. v. DeAngelis Construction, Inc., et al.*